



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

VOL. { 57 O. S.
48 N. S. }

APRIL, 1909

NUMBER 7

THE EXTENT OF THE TREATY-MAKING POWER
OF THE PRESIDENT AND SENATE OF THE
UNITED STATES.

Something has been written on the extent of the treaty-making power of the President and the Senate. Little has been decided.

While the courts have frequently decided questions involving treaties, most of these decisions have been confined to the determination of the question whether a right claimed under the treaty in question was covered by the terms of the treaty, or whether such right, if within the scope of the treaty, had been taken away by subsequent legislation. A very few cases have involved a determination of the extent of the treaty-making power, and in these few the point decided is so narrow, was so inadequately, or not at all argued, or has been rendered so doubtful by dicta of later judges of the Supreme Court as to leave the whole question open.

There are only four clauses in the Constitution and its amendments, in which treaties are mentioned. The first is a prohibition on the States: "No State shall enter into any treaty, alliance, or confederation." Art. I., § 10, cl. 1. The second designates the repository of the power: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Art. II., § 2, cl. 2

The third gives the federal courts jurisdiction in cases arising under treaties: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority." Art. III., § 2.

The fourth provides for the legal effect of a treaty. "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Art. VI. § 2.

There is another clause which provides: "No State shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power * * *." Art. I., § 10, cl. 2.

It will be seen from a reading of these provisions that the treaty-making power is not in terms either limited or made unlimited. It is not, in terms, made absolute, as if it had been provided that all other powers granted or reserved by this Constitution shall be subject to the treaty-making power, but neither is it in terms limited, as if it had been provided that this power shall not be used to deprive any other departments of the federal government, or the States, of any powers vested in or reserved to them respectively. Is the treaty-making power then limited, or absolute? All who have written on the question agree that it is limited, though all do not agree where the limitation should be placed.¹

If, as is admitted, the treaty-making power is impliedly

¹ In the early part of the 19th century some members of Congress, in *debate*, seem to have held the view that this power was unlimited. In the debate on the Louisiana treaty, Senator Cocke, of Tennessee, said: "I would ask what are the constitutional limitations? (on the treaty-making power) It has none, sir, in that respect, and I contend that the treaty-making powers are competent to the full and free exercise of their best judgment in making treaties, *without limitation of power.*" Annals of Cong. (1803-1804), p. 71.

limited, what are the limitations on it? The general answer, in whatever form it is expressed, is that it is limited by other provisions of the Constitution.

The following extracts show the differing views that have been expressed on this question:

"As a sovereign power, invested with the sole management of foreign relations, they must have the right to make treaties of every nature and on every subject which the Constitution does not expressly or impliedly exclude." Simeon E. Baldwin, 7 Col. L. Rev., p. 90.

"A treaty to change the organization of the government or annihilate its sovereignty, to overturn its republican form or to deprive it of its constitutional powers, would be void, because it would destroy what it was designed merely to fulfil, the will of the people." Story on the Const., § 1508.

"By treaty we may not alter the constitutional distribution of powers between the three departments of our Federal Government, or confer on any department a power not conferred on it by the Constitution. . . . A treaty cannot . . . violate any specific general restriction on federal power which may be found in the Constitution. . . . There are . . . implied limitations on the treaty-making power . . . arising out of the fact that the Constitution was adopted by a free people imbued with the importance of individual liberty and firmly believing in democratic institutions. Wm. Draper Lewis, 55 Am. L. Reg., pp. 80-82.

Field, J., in *De Geofroy v. Riggs*, 10 Sup. Ct. Rep., p. 297, says: "The treaty power, as expressed in the Constitution, is in terms unlimited, except by those restraints which are found in that instrument against the action of the government, or of its departments, and those arising from the nature of the government itself, and of that of the States." Another writer declares: "The treaty-making power is pre-eminently a commercial power. It should not be made to interfere with domestic policy and local home rule." Andrew A. Bruce, 54 Am. L. Reg., p. 699.

Cooley says: "The Constitution imposes no restriction upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the States of its constitutional authority." Const. Law, 103.

Butler, in his two-volume work on the Treaty-Making Power, says: ". . . the exercise thereof is controlled not only by constitutional limitations, but also by the general rules of law applicable to all sovereign powers and to their exercise of this prerogative." p. 4. Mr. Butler thinks that the treaty-making power "is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty," *ibid.* p. 5.

Pomeroy, Introduc. to Const. L. of U. S., pp. 559-571, says: "This power cannot be used to deprive Congress or the Judiciary or the President of any general powers which are granted by the Constitution."

White, J., in *Downes v. Bidwell*, denied the general proposition that territory of the United States may, as a mere act of sale, be disposed of. "Though," he says, "from the exigencies of a calamitous war or the settlement of boundaries it may be that citizens of the United States may be expatriated by the act of the treaty-making power, impliedly or expressly *ratified by Congress*," 182 U. S. 317.

A limitation is implied "from the nature of the government itself, and of that of the States," says one.²

It is "subject to the implied restriction that nothing can be done under it which changes the Constitution of the country or robs a department of the government or of any of the States of its constitutional authority," says another.³

It is said by another writer to be impliedly controlled "not only by constitutional limitations, but also by the general rules of law applicable to all sovereign powers and to their exercise of this prerogative."⁴

Another says, a limitation is implied from "the nature of our institutions and the distribution of powers between the general government and the State governments."⁵

A limitation is also said be implied from "the existence

Swayne, J., in *The Cherokee Tobacco*, 11 Wall., p. 620, says: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

Taney, C. J., says: "The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it, and consequently it was designed to include all those subjects which, in the ordinary intercourse of nations, had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the general and state governments." *Holmes v. Jennison*, 11 Pet., p. 569.

Daniel, J., in the *License Cases*, 5 How., p. 613, says: "Laws of the United States in order to be binding must be within the legitimate powers vested by the Constitution. Treaties to be valid must be within the scope of the same powers, for there can be no 'authority of the United States' save what is derived mediately or immediately and regularly and legitimately from the Constitution. A treaty no more than an ordinary statute can arbitrarily cede away any one right of a state or of a citizen of a state."

"If the people of the several states of this union reserved to themselves [which he holds they did] the power of expelling from their borders any person or class of persons whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right and authorizing the introduction of any person or description of persons against the consent of the state would be an usurpation of power which this court could neither recognize nor enforce." Taney, C. J., in *The Passenger Cases*, 7 How., p. 466.

²Field, J., in *De Geofrey v. Riggs*, 10 Sup. Ct. Rep. 297.

³Cooley, Const. L., 103.

⁴Butler, *Treaty-Making Power of the U. S.*, p. 4.

⁵Taney, C. J., in *Holmes v. Jennison*, 11 Pet., p. 569.

of the States, parties to the confederation, having control for most purposes over their own territory.”⁶

Some of these statements of the implied restrictions on the treaty-making power would seem to make the restriction as wide as the restrictions on Congress, others would make the restriction narrower. Most of this latter class are so indefinite that under them one might place the restriction where he pleased under a given state of facts and still be within the statement of the implied restriction.⁷

It is a general principle of constitutional law that any given provision of the Constitution must be construed in the light of other provisions of the same instrument. Are there then any provisions in the Constitution which impliedly limit the treaty-making power, so that if a treaty be made which conflicts with such provisions, such treaty would be unconstitutional? If so, what are they?

By our constitution a certain form of government is created; the governing power is divided into three general departments; the constitution of these departments is provided for; certain enumerated powers are conferred on this government; certain other powers are denied to it generally, or denied to certain departments of it; of the powers conferred some are vested in congress; some in the executive; one in the executive and one branch of the legislative; some in the judiciary; some are prohibited to the States. Finally all powers not granted to the federal government or prohibited to the States are reserved to the States or to the people.

A treaty then may possibly be unconstitutional in any of the following cases: (1) If it alters the form of our government; (2) If it alters the general departmental con-

⁶ Woolsey, Internat. Law, § 99.

⁷ *E. g.*, Under Mr. Butler's statement, above, that the treaty power is controlled by "constitutional limitations," he arrives at the conclusion that by treaty the Federal Government can alienate the territory of a state. While under Justice Field's statement that a limitation is implied "from the nature of the government itself and that of the states," Mr. Justice Field says it would not be contended that such territory could be aliened without the consent of the state.

struction of the government; (3) If it changes the constitution of any of the departments; (4) If it deprives the federal government or any of its departments of its delegated powers, or transfers such power to another department; (5) If it seeks to exercise a power confided to another department of the federal government; (6) If by it it is sought to exercise a power prohibited to the federal government or reserved to the States.

A TREATY ALTERING THE FORM OF THE GOVERNMENT.

It is universally admitted that a treaty though negotiated in the constitutional method by the President and two-thirds of the Senate, the effect of which would be to alter our form of government from a republic to, say, a monarchy, would be unconstitutional. The President and Senate are not only not expressly forbidden to make such a treaty, as Congress is forbidden to make a law abridging freedom of speech, or as the federal courts are forbidden to entertain a suit against a State by a citizen of another State, but the supposed alteration is not even forbidden in general terms, such as the abridgment of the right of the people to bear arms is forbidden. Why then, since the constitution says the President and three-fourths of the Senate "shall have power to make treaties," and places no limit on that power, and no limitation on this particular exercise of the power is found anywhere in the Constitution, would such a treaty be void? Story answers—because "a power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument; it must be construed therefore in subordination to it and cannot supersede or interfere with any other of its fundamental provisions." But why can it not be so construed? Story again answers—"because to so construe it would destroy what it [the Constitution] was designed merely to fulfil, the will of the people."⁸ Another form of the answer, commonly

⁸ Story on the Const., § 1508; Taney, C. J., in *Holmes v. Jennison*, 11 Pet., p. 569, gives as the reason that the framers of the Constitution did not intend to vest such power in the treaty-making power.

given, is that "the treaty power cannot be used to change the constitution."

To these reasons for limiting the power it might be answered that since the people or States in conferring the treaty-making power conferred it without any limitation, it was their will that it should be without limitation; that their will was to confer it absolutely, as it appears in the language of the section conferring it; that if they had not so willed they would have expressed some restriction, as they did in conferring power on Congress. To strengthen this position there might be further pointed out the necessity for the vesting of such absolute and unrestricted power by showing that it is impossible to foresee what complications may arise in the future which might necessitate even such a radical step as a change in our form of government; *e. g.*, a calamitous and unsuccessful war; and that the President and Senate should be clothed with power to meet such an emergency. To the reason frequently given, that the treaty-power cannot be used to change the constitution, the simple answer is that if the constitution, as appears on its face, vests the treaty-making power unlimited, it is not changing the constitution to so construe it. None, even the most zealous in upholding the prerogative of the treaty-making power, have as yet advanced this argument in support of the power of the President and Senate to change our form of government. Nor is it conceivable that this argument would receive serious consideration from any student of constitutional law or from any court empowered to interpret the Constitution.

VALIDITY OF A TREATY ALTERING THE GENERAL DEPARTMENTAL ORGANIZATION OF THE GOVERNMENT.

It is likewise admitted that a treaty which should undertake to alter our tripartite system of government, *e. g.*, to abolish one of the departments, executive, legislative or judicial, would be unconstitutional. The reasons assigned are the same as those given above:—it was the "will of the

people" that it should be otherwise, or "a treaty cannot change the constitution." The answer suggested above would be as conclusive in this case as in the first.

VALIDITY OF A TREATY CHANGING THE ORGANIZATION OR CONSTITUTION OF ANY OF THE DEPARTMENTS OF THE GOVERNMENT.

It is also admitted that the President and Senate have no power to make a treaty changing the constitution or organization of any department of the Federal Government, *e. g.*, a treaty providing that each State or a certain State should be entitled to three Senators, or that an alien born should be eligible for the Presidency, or that members of the House should be appointed by the President, or that the President should be a court of last resort for foreigners, above the Supreme Court. The same reason of Story might be given for the invalidity of such a treaty—it was "the will of the people" that these departments should not be altered by treaty. The same answer—it was the "will of the people" that the treaty-power should be absolute, since they did not limit it—might be made. In this class of cases however a further reason might be given. The Constitution does not specifically provide that the government shall be a republic, or a federal state. That it is such is an inference from many provisions of the Constitution construed together, but in this case (and the immediately preceding) the Constitution specifically provides for certain departments of the government and for the manner in which the departments shall be organized: "The Senate . . . shall be composed of two Senators from each State chosen by the legislature thereof;" "No person except a natural-born citizen . . . shall be eligible to the office of President." But this form of the answer is only another way of stating the "will of the people" answer, and is open to the same reply. True, the Constitution does provide for the organization of the departments, but it also vests a treaty-making power in the President and Senate, and leaves

that power unlimited, hence although until the power is exercised in a manner to change the composition of a department, the composition of that department must remain as provided for by the Constitution, when the President and Senate, by virtue of their unlimited power, choose by a treaty to change it, they may do so. The argument from necessity, too, is as valid in these cases as in the first. How necessary, it may be said, is the possession of such power in the President and Senate! and how wise were the framers of the Constitution in investing them with it. Suppose it should be our ill fortune to wage an unsuccessful war with Japan, and she should demand as the price of peace that the Presidency should be open to the candidacy of Japanese residents, educated under treaty rights in the schools of California. Is it possible that there is no power to end the war by making such a treaty! Is a sovereign nation so helpless! Yet such is the state to which all of our publicists, and all of our judges who have spoken on the subject would reduce us.

A TREATY DEPRIVING THE FEDERAL GOVERNMENT OF ITS DELEGATED POWERS.

It is also said by Story, and denied by none, that a treaty which undertook to deprive the federal government of its delegated powers, *e. g.*, one that vested the power over interstate commerce, or the treaty-making power itself in some other government or re vested it in the States, would be unconstitutional. The same reason is given for this limitation. The same answer suggested above might be made to the reason as given.

VALIDITY OF A TREATY THAT SEEKS TO EXERCISE A POWER CONFERRED BY THE CONSTITUTION ON ANOTHER DE- PARTMENT OF THE FEDERAL GOVERNMENT.

We here come to a class of cases which differ in this respect from the preceding—heretofore the things supposed to be attempted by treaty were things which no other de-

partment of the government is specifically given power to do; under this head we are to consider things which admittedly are within the power vested in the federal government, the power to do which, however, is specifically confided to a department other than the treaty-making power. Under this head would fall a treaty which, without the consent of Congress, undertook to regulate interstate or foreign commerce; which undertook to establish courts; to suspend the writ of *habeas corpus*; to expel a member of Congress; to fix the compensation of federal officers; to raise revenue; to lay taxes; to establish a rule of naturalization; to provide for the punishment of crime; to declare war; to provide for the government of the District of Columbia; to levy taxes, or to admit new States into the Union. These are some of the things the Constitution says Congress shall have power to do.⁹ Can the President and two-thirds of the Senate by a treaty do them without the consent of one branch of Congress—the House of Representatives?

If the President and Senate can make a treaty with England providing for the regulation of commerce between the United States and England without the assent of the House, and such a treaty is, what the Constitution says treaties shall be, the supreme law of the land—and it is idle to talk of the *power* to make such treaty if such treaty when made is not effective—then they can make such a treaty with all foreign countries and concerning all commerce with such countries. If this should be done, has not Congress been deprived of the power, which the Constitution says it shall have, to regulate commerce? Has not the

⁹ It need not be said that reference is here had to the power over particular things vested in Congress, not to the general power given to Congress to make laws necessary for carrying into execution the powers vested specifically in other departments of the Federal Government. This last is a power super-added to the powers committed to Congress for the purpose of assisting other departments in the execution of powers intrusted not to Congress, but to such other departments. Of course, this power of congress is conditioned on the power of such other department. It can neither add to nor take away from the power of any other department.

treaty-making power been used to "change the Constitution"? It has, unless we adopt the argument that since the treaty-making power was given without limitation in terms, it was intended to be unlimited, and hence the Constitution is not changed by so holding it—an argument repudiated above as equally forcible in proving that the treaty-making power may change our form of government, or cede or re-cede the powers vested in the federal government.

The same considerations apply to the other powers vested in Congress.

To Congress is confided the power to declare war. If the President and Senate may by a treaty exercise this power and such treaty is the supreme law of the land, what becomes of the power which the Constitution says Congress shall have to declare war?¹⁰

Congress is given the power to lay, and collect taxes, would not an exercise of this power by the President and the Senate change that clause of the constitution that grants this power to Congress?¹¹

If, under the treaty power, armies may be raised and equipped, or if by the exercise of that power the country may be bound to keep an army in the field, or provide a navy, or call forth the militia, or do any of the things committed to Congress without the consent or against the vote of the House of Representatives, what becomes of the pro-

¹⁰ In Head Money Cases, 112 U. S., at p. 599, Mr. Justice Miller, delivering the opinion of the Court, says: "A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the two. If there be any difference in this respect, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a *declaration of war*, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war." (Italics the present writer's.)

¹¹ Chief Justice Fuller, speaking for himself, Harlan, Brewer and Peckham, JJ., says, in Downes v. Bidwell, 182 U. S., p. 370, "It certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement with a foreign nation by the President and two-thirds of a quorum of the Senate."

visions of the Constitution which say Congress shall have power to do these things?

The same result is reached by another line of reasoning. If Congress, or a constituent part of Congress, may be deprived by the treaty power of one of the powers vested in it by the constitution, it may be deprived of all, in which case that is in effect done what all admit cannot be done, our tripartite organization of government is destroyed—the power to make treaties has become a power to abolish in effect a constituent part of the government and that part which was intended to reflect most directly the will of the people.

If, as held by Chief Justice Marshall,¹² a state cannot tax a Federal Bank because such state might conceivably tax it so greatly as to destroy it, and it has no power to destroy, it would seem to follow by parity of reasoning that, if the treaty-making power has no power to destroy the House of Representatives, it has no power to exercise those powers of Congress which if exercised fully by it would result in the destruction of the House.

If the treaty-making power has this extent even the right of the House, heretofore thought to be necessary to a free government, to originate measures for raising revenue would not be safe from it. The Constitution provides only that “all *bills* for raising revenue shall originate in the House of Representatives;” but since a treaty is not a “bill,” a treaty imposing a tax or containing tariff provisions would not run foul of this limitation.

Nor is it an answer to say that the power is not really taken from the House of Representatives since a bill may be passed by Congress overruling the treaty. Such bill cannot be passed by the House alone, but would require the consent of the Senate, which by the assumption is acting with the President in opposition to the House.

It may be answered to this that there is no more deprivation of any right of the House in this case than in any case

¹² *McCulloch v. Maryland*, 4 Wheat. 316.

where the Senate refuses to acquiesce in a bill passed by the House, or the President vetoes a bill passed by both. There is this radical difference in the cases; the people of the United States by the Constitution have given Congress—a majority of the House plus a majority of the Senate plus the President, or two-thirds of the House plus two-thirds of the Senate, without the concurrence of the President—the power to enact legislation on certain specified subjects. The people have not said they *must* enact legislation on these subjects, but that they may—if the House wishes to enact such legislation, but is opposed by the Senate, the legislation is not enacted—power given Congress has simply not been used. In case, however, the President and Senate make a treaty on a subject over which power is given to the House, the Senate and the President, acting concurrently, the power *has* been used, the law has been enacted, a new rule of conduct has been imposed on the people, by substituting a foreign country or an Indian chief for the House of Representatives. In other words, in the ordinary case of the failure of the Senate to agree with the House no legislation is enacted, hence no power is exercised, but in the case of a treaty such power is exercised and exercised not by Congress, as provided by the Constitution, but by the treaty-making power.

On this phase of our subject—the right of the treaty-making power to do by treaty what Congress has by the Constitution been entrusted with—we are not without a guide. One branch of the treaty-making power itself has gone on record denying this power.

In 1844, April 12, a treaty was signed at Washington, between the United States and the Republic of Texas, by which Texas transferred to the United States all its rights of separate and independent sovereignty and jurisdiction. Three resolutions were introduced by Mr. Benton, May 13. They declared that the ratification of the treaty would be the adoption by the United States of the Texan War, and that the treaty-making power of the President and Senate did not include the power of making war, either by declara-

tion or adoption. On June 8, the treaty was rejected by the Senate by a vote of 35 to 16.

Immediately preceding the rejection of the treaty a resolution was introduced by Mr. Henderson declaring that "such annexation would be properly achieved . . . by *an act of Congress* admitting the people of Texas, with defined boundaries, as a new State into the Union."

This course was followed and on March 1st, 1845, a joint resolution to that effect was approved.¹³

Another phase of this question has been several times at issue between the treaty-power and the House, viz., the power of the President and Senate to make treaties requiring the payment of money by the United States, without the concurrence of the House or, as it is usually expressed, the legal right of the House to refuse to appropriate money necessary to carry into effect a treaty made by the President and the Senate. The contest arose first in Washington's administration over the treaty with England. It was contended by Washington that under the Constitution a treaty when made was the supreme law of the land and therefore the House of Representatives was under an obligation, legal as well as moral, to obey such law by making the appropriation called for by the treaty and, that it would be disobeying the law if it refused so to do. Washington said that any other view of the question would be tantamount to a claim on the part of the House of the right to participate in the *making* of treaties. The House refused to acquiesce in this view of the treaty-power and, while disclaiming any agency in the making of treaties maintained the position that a treaty which provided for the payment of money by the United States must depend for its execution as to such provisions, on a law to be passed by Congress, and that it was the "constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect."¹⁴

¹³ See Crandell, Treaties, Their Making and Enforcement, 95 *et seq.*

¹⁴ Crandall, 122.

In 1868, in Johnson's administration, the same question arose over the Alaskan treaty and, after a conference between a committee of the two Houses, a bill was passed by both. After reciting that the treaty had been entered into by the President and Senate, and that stipulations for payment of money and the admission of certain of the inhabitants to citizenship could not be "carried into full force and effect except by legislation to which the *consent*" of both Houses of Congress was necessary, the bill authorized the appropriation.¹⁵

Thus Congress itself has answered the question as to the power of the President and Senate alone to make effective treaties on this particular subject intrusted to Congress. Indeed there is judicial authority directly holding that the treaty-making power does not extend to the appropriation of money. In the case of *Turner v. Am. Bap. Miss. Union*, 5 McLean, p. 347, McLean, J., said: "A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably applies to all treaties, where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, *the treaty is not perfect*. It is not operative, in the sense of the Constitution as money cannot be appropriated by the treaty-making power. . . . And in such a case, the representatives of the people and the states exercise their own judg-

¹⁵ This bill was the result of a compromise between the House and the Senate, the House having originally passed a bill which read in part: "Whereas the subjects thus embraced in the stipulation [for the payment to Russia of \$7,200,000, and for the admission of certain of the inhabitants of the ceded territory to the enjoyment of the privileges and immunities of citizens of the United States] of said treaty are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress should be given to said stipulation before the same can have full force and effect . . . to the end that the same [the treaty] may be carried into effect. . . . Be it enacted, That the assent of Congress is hereby given to the stipulations of said treaty." Crandall.

ments in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know that so far as the treaty stipulates to pay money, the legislative sanction is required."

The history of treaties concerning revenue laws leads to the same conclusion.

The early treaties of this kind contained no reference to Congress, but the House invariably insisted that where the treaty was in conflict with an existing law it was not effective until the law was changed by Congress. And they made good their contention, the President always submitting the treaty with a recommendation that appropriate legislation be enacted, and the Senate always joining with the House in the bill changing the existing law.¹⁶

In later treaties it has been specifically provided in the treaty that the treaty should go into effect when, or only when, laws necessary to carry it into operation had been passed by Congress,¹⁷ or if not so provided in the treaty itself the Senate has attached an amendment to that effect.¹⁸

In two cases the action of the Senate and of the House has been even more significant. In the case of the reciprocity treaty with the German Zollverein of 1844 Rufus Choate, for the Committee on Foreign Relations of the Senate, reported against ratification. Without reference to the merits of the treaty, the committee was not prepared, he said, "to sanction so large an innovation upon ancient and uniform practice in respect of the department of the government by which duties on imports shall be imposed. . . . In the judgment of the committee the legislative is the department of government by which commerce should be regulated and laws of revenue be passed." The next year this position was reiterated by the Senate, and the treaty

¹⁶ See Crandall, pp. 140-145.

¹⁷ Crandall, pp. 142-143.

¹⁸ Crandall, 143-4.

remained unratified, though ratification was urged by the President.

In 1880 (January 26th) the House of Representatives passed a resolution declaring that the negotiation by the President and Senate of commercial treaties fixing the rates of duty on foreign goods "would, in view of the provisions of section 7 of Article I of the Constitution of the United States, be an infraction of the Constitution and an invasion of one of the highest prerogatives of the House of Representatives."¹⁹

In the Act of Congress, passed in 1897, to carry into effect the treaty with Cuba relating to the tariff on sugar, a clause was inserted declaring that nothing in the Act should be construed on the part of the House that customs duties could be changed otherwise than by an Act of Congress originating in the House.²⁰

As in treaties appropriating money and raising revenue, so in other treaties involving matters confided by the Constitution to Congress, as treaties to protect copyrights, patents, trade-marks and treaties concerning postal regulations. While the compact with foreign governments is made by the treaty power, their local effect is determined by laws of Congress; for while it has never been judicially determined whether the treaty power is alone sufficient to give such treaty the effect of law,²¹ the Congress has always participated in the making of such treaty in the sense that no such treaty has ever been given effect, so far as the writer has been able to discover, that has not been directly authorized or consented to by both houses of Congress.

The history of the cession of territory to the United States is the same, and judicial authority confirms history. Justice

¹⁹ Crandall, 145.

²⁰ Crandall, p. 144.

²¹ The Supreme Court in *The Trade Mark Cases*, 100 U. S. 82, refused to discuss the question. The Court said: "In what we have here said we wish to be understood as leaving untouched the whole of the question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect."

White, concurring in *Downes v. Bidwell*, 182 U. S., p. 319, Shiras and McKenna, J.J., concurring, says: "When the various treaties by which foreign territory has been acquired are considered in the light of the circumstances which surround them, it becomes to my mind clearly established that the treaty-making power was always deemed to be devoid of authority to incorporate territory into the United States without the assent, express or implied, of Congress, and that no question to the contrary has ever been mooted."

He further says: "It seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the *express* or *implied* approval of Congress. . . . If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions."

But it may be said that the argument that treaties negotiated by the President and Senate which provide for things intrusted to Congress are not effective unless the House agrees to them by enacting appropriate legislation, does not go to the *power* of the President and Senate, but only to the effect of the treaty after it is made.

The Constitution says of treaties that they shall be the supreme law of the land. If the President and Senate have power to make the class of treaties under consideration without the consent of the House, then when made without such consent they must be the supreme law of the land. But if when so made they are not effective without legislation by Congress we have the phenomenon of a supreme law of the land binding no one in the land until another law orders the people of the land and the officers of the Government to obey it.

It is true the Supreme Court has said that some treaties are self-executing, while others require legislation to make

them effective, and that treaties of the former class are *ex proprio vigore* the supreme law of the land. No inference, however, can be drawn from this that the President and Senate have power, by so phrasing a treaty as to make it on its face self-executing, to oust the House of Representatives of its right to a voice in any law on a subject confided to it by the Constitution. Even Hamilton never suggested such an easy way to overcome a hostile legislature; the extent of his contention was that the House was under an obligation to pass the laws necessary for carrying the treaty into effect,²² and the courts have held treaties to be not self-executing, but to require legislation to give them the force of law, though they contained no provision which made their efficacy dependent on such legislation.²³

Furthermore, to hold that the President and Senate by casting a treaty in a self-executing form can oust the House of its prerogative in legislation would enable the President and Senate to do what no one has yet claimed for the treaty power. It would enable the President and Senate by simply incorporating into the treaty a provision for an appropriation to make it self-executing. By the assumption the treaty being self-executing, no action by the House would be necessary to make it effective; and being the supreme law of the land, the President by virtue of his constitutional duty to "see that the laws be faithfully executed" must carry it

²² See Letter to Washington, quoted in Crandall, 127.

²³ *Turner v. Am. Bap. Miss. Union*, 5 McLean, 344.

Iredell, J., in *Ware v. Hylton*, 3 Dall., p. 275, after pointing out that the language employed in the tariff treaty of 1786 between England and France is: "The two high contracting parties have thought proper to settle the duties on certain goods and merchandises . . . In consequence of which they have agreed upon the following tariff, &c.," and "His Britannic majesty reserves the right of countervailing, by additional duties on . . . linens, etc." says: "Here is no mention of Parliament, and yet, no man living will say that a bare proclamation of the king, upon the ground of the treaty, would be an authority for the levying of any duties whatever, but it must be done in the constitutional mode, by act of Parliament, which affords an additional proof, that where anything of a legislative nature is in contemplation, it is constantly implied and understood (without express words) that it can alone be effected by the medium of the legislative authority."

into effect. Perhaps he might call on Congress to make the appropriation, but if Congress refused, since, after all, it is not the duty of Congress, but of the President, to execute the law, he might and should execute it by ordering the treasurer of the United States to pay the money provided for in the treaty, and on refusal of the treasurer, seize it, and himself make the appropriation. If the power to make a treaty self-executing exists in the President and Senate, this appropriation by the President would not violate the constitutional provision for the payment of money from the treasury, for Art. I, sec. 9, cl. 7, provides that "no money shall be drawn from the treasury but in consequence of appropriations made by law," and by the assumption such appropriation in the treaty would be made by law. If this be the law, what a pity it is that Washington and Johnson, their advisers and the Senates of their administrations did not know it. Much time that was lost and trouble that was encountered in trying to persuade the House of its duty to pass an act making the necessary appropriation called for by the Jay and the Alaskan treaties might have been saved by the simple expedient of inserting the necessary words of appropriation in the treaty itself. Yet if it is not the law it is only because the treaty-power cannot be used to deprive the House of any of the powers given it by the Constitution.

It may be said that although the Constitution gives Congress power to do these things it does not say that *only* Congress shall have such power, and as the power of the President and Senate is not limited it may do the same things by treaty. True, the Constitution does not say that *only* Congress shall exercise the powers conferred on Congress, except as it provides in Art. I, § 1, that "all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and these are the legislative powers it then proceeds to vest in Congress, but then neither does it say that *only* the President and the Senate may make treaties. The language used in conferring the respective

powers and in providing for the effect of their exercise is identical—"He shall have power . . . to make treaties," "Congress shall have power to regulate commerce," etc., "all laws passed in pursuance thereof [the Constitution] and all treaties . . . shall be the supreme law of the land." The power given Congress is not on its face exclusive, and the power given the treaty-making power is not on its face exclusive; the power given the treaty-making power is on its face unlimited, the power given Congress in relation to the powers vested in it is on its face unlimited.

Any argument, then, drawn from the words of the Constitution which would give the treaty-making power the power to make a treaty having the force of law on a subject over which Congress is given power, without the concurrence of the House of Representatives, would give the Congress, by virtue of its unlimited power to regulate commerce, the right to make a treaty providing for such regulation of commerce. Likewise, any argument that would deny to Congress the right to make a treaty regulating foreign commerce [by virtue of its unlimited power to regulate such commerce] without the concurrence of the treaty-making power,²⁴ would deny the power of the President and Senate to make a valid treaty regulating such commerce, without the consent of the House. Of course, the same considerations which apply to the regulation of commerce apply equally to the other powers vested by the Constitution in Congress, for there is no difference in the language used to vest in Congress the power to regulate commerce and that used to vest any of the other powers confided to Congress.

There is involved here no question of "strict construction" or of "broad construction," for it is not a question of the conferring or reserving of a power, but of the repository or distribution of powers admittedly conferred on the federal government. A strict construction of the power of the President and Senate is a broad construction of the power of Congress and *vice versa*.

²⁴ The concurrence of two-thirds of the Senate would be necessary for the treaty.

How then are these seemingly conflicting powers to be reconciled. The writer ventures to suggest that our history has answered them correctly, and that that answer is this: That so far as the domestic or intraterritorial effect of the exercise of any of the powers committed by the Constitution to Congress are concerned, Congress alone has any power in the premises. But Congress has no power to treat with foreign nations, hence when any of these powers vested in Congress are to be exercised in agreement with a foreign power, the *agreement* with such foreign nation must first be completed by the treaty-making power, but this *agreement*, though it is a treaty in the meaning of that word as used in international law,²⁵ is not a treaty in the sense intended by the Constitution when it says a treaty is the supreme law of the land. To be that, it must be sanctioned by an act of Congress. This view, it is submitted, not only does no violence to the Constitution, but on the contrary gives effect to the seemingly conflicting powers of the two departments without making one supreme over the other.

That the conclusion here arrived at is not a strained or narrow one, but the restriction contended to exist is politically a natural and fundamental one, is shown by the fact that similar restrictions exist in other countries. By the law of England, though the power of the King in international affairs in comparison with the power of parliament is greater than that of the President in comparison with Congress, as the King alone can directly make war and

²⁵ This distinction between a treaty, as that word is used in international law, and as it is used in our Constitution, has been taken by the Supreme Court in *Hoover v. Yaker*, 9 Wall. 32. It was there held that while under the general principles of international law a treaty is binding from the date of its *signing*, and that the exchange of ratifications has a retroactive effect, that under our Constitution, since a treaty is declared to be the supreme law of the land, a different rule prevails when a treaty operates on individual rights. In such case it is not effective until it is ratified by the Senate and proclaimed. The same difference may be seen in the case where a treaty has been abrogated by a subsequent act of Congress. In such case the treaty as an agreement still subsists, but as the supreme law of the land it has been abrogated.

peace, yet no treaty made by the King which "involves either a charge on the people, or a change in the law of the land" can "be carried into effect without the sanction of parliament. Such treaties are therefore made subject to the approval of parliament. . . . Such are treaties of commerce . . ." ²⁶

By Art. LXVIII of the Constitution of Belgium, treaties of commerce and those that may burden the State, *i. e.*, impose financial obligations, or bind Belgians individually are not effective until they have received the assent of the Chambers; and no cession or exchange of territory may take place except by virtue of a law.²⁷

In the Netherlands treaties for a change of territory, that impose pecuniary obligations on the kingdom or that contain any other provision concerning legal rights, require the approval of the States-General.²⁸

A strict construction of the Fundamental Statute of Italy would require the assent of the Chambers only to treaties involving financial obligations and change of territory. "In practice, however, treaties of commerce as well as all treaties touching upon matters legally belonging to parliament are submitted to that body for ratification."²⁹

Art. VIII of the Constitutional Law of France of 1875 provides: "The President of the Republic negotiates and ratifies treaties. He communicates them to the Chambers as soon as the interest and safety of the State permit. Treaties of peace, and of commerce, treaties which involve the finances of the State, those relating to the persons and property of French citizens in foreign countries, shall become definitive only after having been voted by the two chambers. No cession, no exchange, no annexation of territory shall take place except by virtue of a law." The practice of the French Chambers has been to give the

²⁶ II Anson, Law and Cust. of the Const., p. 297.

²⁷ Crandall, p. 187.

²⁸ Crandall, p. 190.

²⁹ Crandall, p. 193.

widest scope to the meaning of the terms "commerce" and "finances" in this article, and treaties affecting only indirectly commerce and finance are ratified by the Chambers.³⁰

It is provided in Art. XI of the Constitution of 1871 of the German Empire that treaties which refer to matters which, according to Art. IV belong to the field of imperial legislation for their conclusion, the consent of the Bundesrath is necessary, and for their validity the approval of the Reichstag. Art. IV includes literary and industrial property, commerce, customs duties, citizenship and postal, telegraphic and railway matters.³¹

In Austria-Hungary the Austrian Constitution requires the consent of the Reichsrath to all commercial treaties and those that burden the State or a portion of it, or impose obligations on individual subjects, or make territorial changes.³²

The Constitution of Spain has similar provisions, and expressly provides that the legislation must precede ratification.³³

WILLIAM E. MIKELL.

University of Pennsylvania.

(To be continued.)

³⁰ See Crandall, p. 178.

³¹ Crandall, 197.

³² Crandall, 200.

³³ Crandall, 205.